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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	MM Docket No. <u>99-153</u>
	)	
READING BROADCASTING, INC.	)	File No. BRCT-940407KF
	)	
For Renewal of License of Station	)	
WTVE(TV), Channel 51,	)	
Reading, Pennsylvania	)	DOCKET FILE COPY ORIGINAL
	)	
and	)	
	)	
ADAMS COMMUNICATIONS	)	
CORPORATION	)	File No. BPCT-940630KG
	)	
For Construction Permit for a	)	
New Television Station On	)	
Channel 51, Reading, Pennsylvania	)	

To: Administrative Law Judge Richard L. Sippel

READING BROADCASTING, INC.'S  
MOTION TO ENLARGE ISSUES  
(MISREPRESENTATION / LACK OF CANDOR)

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July 17, 2000

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## **SUMMARY**

Adams has made numerous misrepresentations during the course of these proceedings. The most blatant examples are Adams' misrepresentations as to: (A) its intentions underlying the filing of its application for Channel 51, Reading, Pennsylvania (infra at 3-13); (B) its dealings with Telemundo with respect to settlement (infra at 14-27) and programming (infra at 27-32); (C) Howard Gilbert's review of the videotapes made by Paul Sherwood (infra at 32-40), the extent of Mr. Sherwood's reports to Gilbert (infra at 40-42), and Gilbert's instructions to Mr. Sherwood (infra at 43-45); (D) its intentions with respect to programming (infra at 45-51); and (E) the facts surrounding its corporate dissolution (infra at 51-53). As demonstrated herein, these misrepresentations raise sufficient doubt as to Adams' candor that a hearing issue should be added and further inquiry made to determine whether Adams' misconduct warrants its disqualification and/or the imposition of a forfeiture.

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## **I. ISSUES REQUESTED**

Reading Broadcasting, Inc. ("Reading"), by its undersigned counsel, pursuant to Rule 1.229, hereby moves to add the following hearing issues:

- (a) Whether Adams made misrepresentations / lacked candor to the Commission during these proceedings;
- (b) In light of evidence adduced under Issue (a), whether Adams is qualified to be a licensee; and
- (c) In light of evidence adduced under Issue (a), whether a forfeiture penalty should be assessed against Adams.

For the reasons set forth below, this Motion should be granted and the foregoing issues added.

## **II. LEGAL STANDARDS**

The following decisional standards apply to this Motion:

### **A. Adding an Issue**

A hearing issue will be added when the totality of the evidence raises a sufficient doubt as to a substantial and material question of fact such that further inquiry is called for. Citizens for Jazz on WRVR, Inc. v. F.C.C., 775 F.2d 392, 394-395 (D.C. Cir. 1985); In Re Application of Heidi Damsky, 8 F.C.C. Rcd. 6242, ¶¶ 10-11 (Rev. Bd. 1993). It is well established that allegations of misrepresentation are material and that false statements made in the course of the hearing process are of substantial significance. See, e.g., Citizens for Jazz on WRVR, Inc., 775 F.2d at 394; RKO General, Inc. v. F.C.C., 670 F.2d 215, 235 (D.C. Cir. 1981).

## **B. Misrepresentation / Lack of Candor**

A misrepresentation is a false statement of fact, whereas lack of candor involves a concealment, evasion, or some failure to be fully informative. Fox River Broadcasting, Inc., 93 F.C.C. 2d 127, 129 (1983). In either case, intent to deceive is an essential element. Weyburn Broadcasting Ltd., 984 F.2d 1220, 1232 (D.C. Cir. 1993). Such intent can be found where the misrepresentation is made with knowledge of its falsity. David Orvitz Radio Corp. v. F.C.C., 941 F.2d 1253, 1259 (D.C. Cir. 1991). Deceitful intent can also be inferred from motive. In Re Application of Joseph Bahr, 10 F.C.C. Rcd. 32, 33 (Rev. Bd. 1994).<sup>1</sup>

Thus, in this case, if the totality of the evidence raises a sufficient doubt as to Adams' candor in the course of these proceedings, the requested issues must be added.

## **III. ARGUMENT**

As demonstrated below, Adams has made numerous misrepresentations during the course of these proceedings that raise significant questions as to its candor; accordingly, the requested issues should be added and further inquiry made into these matters.

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<sup>1</sup> In addition to disqualification, intentional deception and/or other misconduct during the application process the applicant may also be liable for a forfeiture. 47 C.F.R. 1.229(f); 47 U.S.C. 503(b). Moreover, even in the absence of deceptive intent, the Commission may still impose a forfeiture penalty for a willful omission of a material fact. 47 C.F.R. § 73.1015.

**A. The WTVE Challenge**

Throughout this process, Adams has given inconsistent testimony about why it filed its application for Channel 51 in Reading, Pennsylvania. Initially, Adams claimed that the purpose of its application was to contest the public interest value of home shopping programming. (October 14, 1999 Deposition of Howard Gilbert ("Gilbert Depo.") at 14:9-17:17 (pertinent excerpts of the Gilbert Depo. are attached hereto as Exhibit A.))

When Reading questioned the veracity of Adams' stated purpose in its November 2, 1999, Motion to Dismiss Adams' Application or, Alternatively, to Enlarge Issues (Abuse of Process), suggesting that Adams had actually filed its application for speculative purposes, Adams adamantly insisted that it was formed "for the purpose of challenging the renewal of television stations airing home shopping programming which was not serving any local interest" and that, through the mechanisms of the competitive renewal application process, Adams would be able to demonstrate that home shopping programming fails to serve the public interest. (November 22, 1999 Declaration of Howard Gilbert ("Gilbert Decl."), ¶¶ 7-11 (the Gilbert Decl. is in the record as Reading Hearing Ex. 24.)) In fact, in its Opposition to Reading's Motion, Adams confirmed that "Adams's principals have uniformly testified that they chose to challenge RBI's renewal because they do not and did not believe that the home shopping television format serves the public interest." (November 22, 1999, Opposition of Adams Communication Corporation to Reading's Motion to Dismiss Adams' Application, or Alternatively, to Enlarge Issues (Abuse of Process) at 8.)

In January, in conjunction with his testimony in Phase I, Gilbert further confirmed that Adams' motivation in pursuing its challenge against Reading was to obtain a Commission precedent against the public interest value of home shopping programming. In that regard, Gilbert testified:

The Court: Was there any consideration given, you have a very interesting group of business people there.

Mr. Gilbert: Yeah.

Q: Formulate some kind of syndicate, and then they can offer a sum of money to get an assignment of a channel on which the shopping was being, the home shopping was being broadcast. Would you be able to then change the name to something that would be more cerebral or –

A: That wouldn't have achieved the result we were trying to achieve. We'd been successful in Monroe, in first knocking off pay TV. Equally or more important, as it came, we stopped pornography in the United States. . . .<sup>2</sup>

\* \* \*

The Court: You left [Channel] 44 in '92. The business plan, you were concerned about home shopping. Home shopping was bothering you. Your group.

Mr. Gilbert: Right.

Q: I'm asking you was there an option or could an option have been considered about buying one of those stations and taking home shopping off and turning it around. And I don't know what you answered to that, but you didn't answer my question. You said something about that wouldn't work.

A: What happens in these cases is, the problem is how to get the FCC to make a statement and do something so you would change

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<sup>2</sup> Gilbert pronounced the Monroe case to have been "highly successful from our point of view." Notably lacking from Gilbert's claims of why Monroe's challenge to Video 44 was "highly successful" is any consideration of Monroe having obtained the station's license. (See Gilbert Testimony, Hearing Transcript ("Tr.") at 1114:25-1116:3.)

the nature of broadcasting. If we buy – We believe home shopping network –

Q: Okay.

A: Can I answer it differently?

Q: Yes.

A: We believe Home Shopping Network is not –

Q: Wait just a second. With that answer you know, with that answer then what you're suggesting to me is that first you're saying a transfer or *assigning*<sup>3</sup> of a Chicago station which was specializing in home shopping would not have accomplished what you wanted to accomplish because that would not have involved the FCC and making some sort of a public interest statement as they were required to do in Video 44.

A: Right.

\* \* \*

The Court: And now you're moving on to Reading, and the route you've just outlined here. You want to go after Reading because you want the Commission to make a statement about home shopping. I'm paraphrasing what you're saying.

Mr. Gilbert: That's correct.

(Gilbert Testimony, Hearing Transcript ("Tr.") at 1114:25-1115:13, 1118:2-1119:4, 1124:20-25; see also Memorandum Opinion and Order, FCC 00M-07, ¶ 4 (released January 20, 2000) ("An Adams principal confirmed under oath that Adams' sole interest in prosecuting its application is to remove home shopping from all of broadcasting because in Adams' view it is economically impossible to provide public service broadcasting on a home shopping channel.")) In that regard, Mr. Gilbert

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<sup>3</sup> Errata – the original transcription reads "*of a signing*."



even went so far as to characterize the Adams principals as public interest crusaders. (Gilbert Testimony, Tr. at 1132:7-20; see also infra note 5.)

Subsequently, the ALJ granted, in part, Reading's Motion and added an abuse of process issue to explore the question of Adams' intent in filing and prosecuting its application. Memorandum Opinion and Order, FCC 00M-07 (released January 20, 2000). On February 7, 2000, Adams sought leave to appeal the addition of the abuse of process issue. In denying Adams' request for leave to appeal, the ALJ indicated that the filing of an application for the purpose of obtaining a precedent against home shopping programming (i.e., a "thing of value" to Adams) might, itself, be an abuse of the comparative renewal application process. See Memorandum Order and Opinion, FCC 00M-19, ¶¶ 7-11 (released March 6, 2000).

Only then, faced with the possibility that its initially stated position could result in an abuse of process finding against it, did Adams claim that its primary purpose in filing its application was actually to own and operate a television station in Reading, Pennsylvania, and that its previously claimed purpose of advancing the public interest by obtaining a precedent against home shopping programming was only a means of attaining the newly-announced goal of owning and operating a television station. Specifically, Adams claimed that:

Mr. Gilbert knew that, if the incumbent licensee did not receive a "renewal expectancy", a competing applicant for that license would have a reasonable chance of obtaining the license for the limited cost of preparing and successfully prosecuting the competing application. Since that cost would invariably be less than the value of the station which could be obtained through the comparative renewal process, Mr.

Gilbert perceived the opportunity to file a competing application against a "home shopping" station to be both a prudent undertaking as business matter (since it could result in the obtaining of a valuable television station at a bargain price) and a salutary effort to advance the important public interest inherent in promoting substantial, locally-oriented, locally-produced programming relating to issues of local importance.

(Supplement to Answers of Adams Communication Corporation to Interrogatories, filed May 16, 2000, at 3.)

Adams completed revising its position when, on June 21, 2000, Gilbert testified that Adams decided to file its application "[b]ecause it was a low-cost way to obtain a television station." (Gilbert Testimony, Tr. at 2467:14-20.) In fact, by June, Adams had fully abandoned its prior claim to an interest in fighting home shopping programming by obtaining a Commission precedent:

Mr. Cole: Could you tell me why Adams decided to file a comparative renewal application, that is, a challenge application against an incumbent renewal licensee?

Mr. Gilbert: Because it was a low-cost way to obtain a television station. It's also a way that we could do what we want to do in the broadcast industry, which was to provide some public service.

Q: Could you explain the last part of your answer, please?

A: Well, we assumed that we would be replacing a Home Shopping Network station and it was a strong belief of a number of the principals that Home Shopping Network was, I would say, a star in television, it had no real place either.

Q: And how would the comparative renewal process have resulted in replacing home shopping programming with something else?

A: The comparative renewal process would pit Adams against a station which presumably wasn't providing locally originated programming that dealt with community issues.

Q: Could you explain why Adams was interested in home shopping programming?

A: Adams was looking for a way to obtain a station<sup>4</sup> and it appeared that the kind of programming that would be most vulnerable would be Home Shopping Network programming. A number of the principals, a significant number of them actually, had viewed Home Shopping Network in Chicago and around the country, and in general, they believed that it wasn't doing what they believed to be the job of broadcast stations; that it wasn't serving the local communities as they saw it. So they felt that, in general, it would be vulnerable to a challenge.

Well, they also had followed the FCC proceeding and I had read the dissent of Commissioner Duggan and the very interesting concurring opinion of Commissioner Barrett. We also had been following the pleadings of the Media Access Project. I had been talking to Andy Schwartzman, with whom I had a long-term relationship, about what was going on, and we thought that many, if not all, of the Home Shopping Network stations weren't following through on what they were supposed to be doing; that they weren't providing locally originated programming that dealt with the community problems.

(Gilbert Testimony, Tr. at 2467:14-2469:5.)

Adams' position with respect to its invocation of the comparative renewal application process has changed 180 degrees during the course of these proceedings, going, first, from having the sole purpose of removing home shopping programming from the airways by obtaining a Commission precedent, to having such precedent being merely a secondary interest, to being indifferent to home shopping programming except to the extent that it was a potentially vulnerable form of programming which Adams could exploit to obtain a television station license. Faced with the likelihood that its previously stated purpose of obtaining an FCC

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<sup>4</sup> Of course, this testimony must be considered in light of the fact that, just prior to commencing its pursuit of this comparative application process, Adams/Monroe, for all intents and purposes, had a station – Channel 44 in Chicago, Illinois. That being the case, it seems dubious, at best, that “Adams was looking for a way to obtain a station.”

precedent against home shopping programming would result in an abuse of process finding against it, Adams had ample motive to “revise” its position. Such motive to fabricate clearly supports a finding of intent to deceive against Adams.

That Adams’ newfound intent to obtain a television station at a “bargain price” by challenging home shopping stations is a convenient fabrication is further demonstrated by a review of the totality of the evidence. Thus, for example, Adams has stated that it did not matter where in the country the station it challenged was located. (Gilbert Testimony, Tr. at 1119:7-1124:9) The determinative factor in selecting which station to challenge was solely based on which “home shopping” station’s license came up for renewal first. (Id.) Nor did Adams care whether the station it applied for was profitable.<sup>5</sup> (Gilbert Testimony, Tr. at 1065:21-1066:3.) This testimony negates Adams’ new claim that it was seeking a profitable opportunity to acquire a television station. If Adams’ motive were to obtain a station at a bargain price, then presumably Adams would have sought the best bargain available. That being the case, why didn’t Adams file a competing application against the most valuable station airing home shopping programming instead of just filing against the next home shopping station in line for license

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<sup>5</sup> In fact, in this regard, Gilbert, once again, emphasized Adams’ interest in public service:

Mr. Hutton: Did you ever research the income or revenue of the station WTVE before filing the Adams application?

Mr. Gilbert: No. We weren’t interested in that. We were a public interest case.

(Gilbert Testimony, Tr. at 1065:21-24.)

renewal, particularly a station that had recently been in bankruptcy? (Gilbert Testimony, Tr. at 1110:13-16, 1123:9-1124:2.)

The record also shows that Adams never made any effort to even look for, let alone purchase, a television station, anywhere. (Gilbert Testimony, Tr. at 2542:1-6.) If Adams' true intent was to gain ownership of a television station at a bargain price, as it now claims, regardless of location or profitability, why didn't it first try to find a station it could simply buy outright?

Certainly, if location and profitability are not considerations, one would expect that Adams could have found a station, perhaps one in financial difficulty, that it could purchase outright for a "bargain price." Yet, Adams made no effort, whatsoever, even to determine whether a "bargain price" station might be for sale. It is inconceivable that, if it truly wanted to obtain a television station at a "bargain price", Adams, knowing full well the vagaries of the comparative renewal process and the historically low record of success by overfilers, would undertake the significant risks, uncertainties, and costs involved in the comparative renewal process without first, at least, looking into the possibility of buying a station outright. The only reasonable explanation for not first looking to buy a station is that obtaining a station is not and never has been Adams' primary purpose; Adams' recent claim to such purpose is clearly false.

In addition, Adams' new claim, that it pursued the comparative renewal process because the cost of obtaining a station through that process "would invariably be less than the value of the station which could be obtained," is, itself,

suspect. Thus, Adams never sought to appraise or value WTVE (or Adams initial target, WSHH in Marlborough, Massachusetts), prior to filing its application. (Gilbert Testimony, Tr. at 1065:21-1066:9; 2530:17-19.) Nor did Adams solicit a sales price from Reading (or from the owner of WSHH), prior to filing its application. (Gilbert Testimony, Tr. at 2530:13-22, 2541:19-25) Thus, there is simply no factual basis for Adams' claim that it would be less expensive to acquire WTVE, or any other station, through the comparative renewal process rather than through outright purchase of the station. Without having done an investigation into the value of WTVE and the cost to purchase it outright versus the cost of litigation (with the attendant risk of losing on the merits), Adams' claim that engaging in the competitive renewal process would "invariably" result in obtaining WTVE at a bargain price is quite doubtful. Again, if this were truly Adams' motive, then Adams presumably would have targeted the most valuable home shopping station, instead of just taking the luck of the draw to challenge the next home shopping station coming up for license renewal, particularly one that had recently been in bankruptcy (Gilbert Testimony, Tr. at 1110:13-16, 1123:9-1124:2.)

Finally, and perhaps most significantly, if, as it now claims, Adams filed its application for the primary purpose of obtaining a television station at a "bargain price," why did it abandon Channel 44 in Chicago? Thus, as of September 1992, the Adams principals (conducting their business as Monroe Communications) were the prevailing applicants for Channel 44 in Chicago – a station worth in excess of \$50 million. (Gilbert Testimony, Tr. at 1003:18-1005:4, 1130:22-1131:2.) Monroe,

however, after more than a decade of litigation and with only Video 44's appeal left to contend with, gave up its pursuit of that television station license in exchange for a substantial payment without ever operating the station. (Gilbert Testimony, Tr. at 1130:11-25, 2516:19-2517:7; Gilbert Decl., ¶¶ 5-6.) Almost immediately thereafter, however, Adams began its pursuit of a "home shopping" station to challenge. (Gilbert Testimony, 1114:2-6, 2471:13-2474:7; Joint Request for Approval of Settlement Agreement, Dismissal of Monroe Application and Grant of Video 44 Application (the Joint Request is in the record as Reading Hearing Ex. 19); Order, FCC 92I-097, released December 24, 1992, approving the Monroe Settlement Agreement (the Order is in the record as Reading Hearing Ex. 22); Letter dated July 16, 1993, from Mr. Cole to Gilbert and enclosed list of television stations licensed to subsidiaries of the Home Shopping Network (the Letter and List are in the record as Adams Hearing Ex. 66.)) Adams' claim that it sought to challenge "home shopping" stations because it hoped to obtain a station, at a "bargain price" or otherwise, simply cannot be reconciled with its abandonment of its granted Channel 44 application.

Adams/Monroe claims that it settled the Video 44 case because Univision would not deal with them and Telemundo was in financial trouble, leaving Monroe without a source for its proposed Spanish language programming. (Gilbert Testimony, Tr. at 1007:13-1009:9, 1127:18-1131:13.) However, Adams claims that it planned to air Spanish language programming in Reading (Gilbert Testimony, Tr. at 1125:1-1127:8; Fickinger Testimony, Tr. at 2441:18-2445:21), yet Adams never

investigated the availability of Spanish language programming in Reading. (Gilbert Testimony, Tr. at 1107:11-14; Transcript of the November 12, 1999, Deposition of Robert Haag ("Haag Depo.") at 17:3-18 (a copy of the Haag Depo. is in the record as Reading Hearing Ex. 44.))<sup>6</sup> Having just been frustrated in its plans to go on the air in Chicago due to the unavailability of Spanish language programming, Adams/Monroe nevertheless claims that it had the same plans for Reading even though it never investigated the availability of Spanish-language programming there.

Adams' fabricated statement of intent to own and operate a television station is nothing more than a last-ditch effort to escape the noose of its prior asserted intent of obtaining a Commission precedent by challenging home shopping programming. Faced with lying or losing, Adams was clearly motivated to fabricate this new position. In addition, Adams' "new" original intent is itself clearly inconsistent with the totality of the evidence. Adams' mid-course reversal raises sufficient doubt as to Adams' candor to warrant further inquiry.<sup>7</sup>

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<sup>6</sup> Telemundo's financial difficulties led it into bankruptcy in 1993-94 (see news articles concerning Telemundo's bankruptcy dated November 1, 1994, and December 29, 1994, attached hereto as Exhibit B), so it was presumably out of consideration in Reading just as it was for Monroe in Chicago. Since Univision was already on the air in the Reading, Pennsylvania market, it was similarly unavailable to Adams as a source for Spanish language programming in Reading.

<sup>7</sup> A statement of intent to operate a station made by a party who, in fact, lacks such intent is a material misrepresentation. In the Matter of Amendment of Section 73.202(B), Table of Allotments, FM Broadcast Stations (Saranac Lake and Westport, New York), MM Docket No. 99-83, DA 00-945, at n.4 (released April 28, 2000) (citing Abuses of the Commission's Processes, 5 F.C.C. Rcd. 3911, 3914 (1990)); In the Matter of Amendment of Section 73.202(B), Table of Allotments, FM Broadcast Stations (Pleasant Dale, Nebraska), 14 F.C.C. Rcd. 18, 893, n. 3 (1999).



**B. Dealings with Telemundo**

Adams' intent to deceive is further exemplified by its testimony with respect to its dealings with Telemundo concerning both the prospects of settlement and the provision of programming. In these respects, Adams first sought to conceal its involvement with Telemundo and then, when it became inescapable, to minimize and justify such involvement. Adams' testimony in this regard was knowingly false as well as motivated by an intent, for obvious reasons in light of the pending abuse of process charges, to hide any evidence of settlement negotiations. Adams' obfuscation raises significant doubts as to Adams' candor sufficient to warrant further inquiry.

**1. Appraisal and Settlement**

The evidence now in the record clearly reveals that Adams had significant dealings with Telemundo with respect to a possible settlement. Thus, on April 30, 1999, Anne Swanson, an attorney with the law firm of Dow Lohnes & Albertson in Washington, D.C., on behalf of her client Telemundo, spoke with Harry Cole, counsel for Adams, about the possibility of settling this renewal application proceeding. (Swanson Testimony, Tr. at 2215:8-2217:6, 22119:12-2222:13, 2301:16-2302:1; Ms. Swanson's handwritten notes ("Swanson Notes") at 4-5 (Ms. Swanson's Notes are in the record as Reading Hearing Ex. 52.)) During their initial conversation, Ms. Swanson asked as to Adams' level of interest in settlement or a settlement amount and Mr. Cole informed her that Gilbert liked to do his own negotiating. (Swanson Testimony, Tr. at 2215:11-17, 2219:3-24; Swanson Notes at 4.) Later that day, Ms. Swanson again spoke with Mr. Cole at which time he

advised her that, while Gilbert planned to pursue the application, he would not say no to settlement. (Swanson Testimony, Tr. at 2219:18-2221:8; Swanson Notes at 5.)

Later that same day, April 30, 1999, Ms. Swanson telephoned Gilbert. (Swanson Testimony, Tr. at 2219:18-2220:15, 2222:14-2224:18, 2302:2-14; Dow Lohnes & Albertson Telephone Report for April 30, 1999 (a copy of the Telephone Report is in the record as Reading Hearing Ex. 51, p.2.)) During that conversation, Ms. Swanson asked Gilbert for a settlement figure and Gilbert responded that he could not give her a figure because Adams had not valued the station. (Swanson Testimony, Tr. at 2225:18-2226:9; Swanson Notes at 5.) Gilbert then committed Adams to pay one-third of the expense of obtaining an appraisal of Station WTVE. (Swanson Testimony, Tr. at 2223:12-2224:18, 2230:17-2231:4; Swanson Notes at 5, Letter from Gilbert to Ms. Swanson dated April 22, 1999 (a copy of that Letter is in the record as Reading Hearing Ex. 57.<sup>8</sup>)) Gilbert also indicated that Adams would be reasonable with respect to a possible settlement. (Swanson Notes at 5; April 30, 1999, E-Mail from Ann Gaulke to Alan Sokol<sup>9</sup> (a copy of the April 30, 1999, E-Mail is attached hereto as Exhibit C.)

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<sup>8</sup> Despite having specifically requested the production of “every document that concerns or relates to the value or potential value of WTVE . . . or a proposed settlement of this proceeding,” the Gilbert letter to Ms. Swanson (Reading Hearing Ex. 57) was not produced by Adams. Reading secured Gilbert’s letter from Ms. Swanson in response to a subpoena *duces tecum*. The failure to produce this document is consistent with Adams’ efforts to conceal its involvement with Telemundo.

<sup>9</sup> Ms. Gaulke and Mr. Sokol are both Telemundo executives. Ms. Swanson identified Ms. Gaulke as the Vice President of Network Affiliate Relations and Mr. Sokol as being at the same level or senior to Ms. Gaulke. (Swanson Testimony, Tr. at 2192:2-15, 2283:19-2284:7.)

On May 27, 1999, Ms. Gaulke advised Andy Kaplan<sup>10</sup> that “Adams has recently contacted our counsel at Dow, Lohnes to inquire as to a settlement offer and are requesting a meeting with Dow, Lohnes next week to discuss.” (May 27, 1999, E-Mail from Ms. Gaulke to Mr. Kaplan (a copy of the May 27, 1999, E-Mail is attached hereto as Exhibit D.)

On June 2, 1999, Ms. Swanson received the appraisal.<sup>11</sup> (Swanson Testimony, Tr. at 2265:5-2266:8; June 2, 1999, Fax Transmittal Cover Sheet (the June 2, 1999, Fax Transmittal Cover Sheet is in the record as Reading Hearing Ex. 62); the Bond & Pecaro Appraisal (the appraisal is in the record as Adams Hearing Ex. 75<sup>12</sup> at 2-23.)) The next day, Ms. Swanson faxed the appraisal to Mr. Cole along

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<sup>10</sup> Ms. Swanson could not identify Mr. Kaplan. (Swanson Testimony, Tr. at 2260:22-2261:3.)

<sup>11</sup> Ms. Swanson’s time entry for June 1, 1999, indicates that, on that day, she had a “telephone conference with A. Gaulke regarding B. Adams visit and status of [the appraiser] request.” (Dow Lohnes & Albertson Billing Records for June 1, 1999 (the Billing Records are in the record as Reading Hearing Ex. 50.)) Ms. Swanson could not explain why the entry refers to “B. Adams,” but conceded that “sometimes the secretaries have trouble reading my time sheets and sometimes I don’t proof them before they go in.” (Swanson Testimony, Tr. at 2263:3-2264:17.) While Ms. Swanson testified that she never met or planned to meet with anyone from Adams, she was unaware of whether anyone from Telemundo had ever met with anyone from Adams – in that regard, Ms. Swanson specifically limited her testimony to whether a Telemundo-Adams meeting had ever taken place, leaving open the possibility that such a meeting had been planned. (Swanson Testimony, Tr. at 2264:12-2265:4; see also id., Tr. at 2265:5-2267:10; Fax Transmittal Cover Sheet from Ms. Swanson to Ms. Gaulke dated June 2, 1999 (Reading Hearing Ex. 62) (stating “I enclose the valuation and analysis that I just received from [the appraiser]. Given the late hour, I have not yet read the report, but I wanted to rush it to you given that Adams’ principal is expected to be in town tomorrow.”)) These facts certainly raise a question about a possible Telemundo-Adams meeting and further implicate Gilbert’s candor with the respect to Adams’ dealings with Telemundo.

<sup>12</sup> Adams Hearing Ex. 75 comprises Ms. Swanson’s cover letter to Mr. Cole (p.1), the fax transmittal page for the appraisal from the appraiser to Ms. Swanson (p.2), and the appraisal itself. Despite having specifically requested the production of “every document that concerns or relates to the value or potential value of WTVE . . . or a proposed

with a letter reconfirming that Adams had agreed to pay for a third of the cost. (June 3, 1999, Letter from Ms. Swanson to Mr. Cole (the June 3, 1999, letter is in the record as Adams Hearing Ex. 75.))

On June 7, Gilbert, Mr. Cole, and Ms. Swanson<sup>13</sup> participated in a telephone conference to discuss the appraisal and settlement. (Swanson Testimony, Tr. at 2268:6-2274:7, Swanson Notes at 10-11.) Of particular concern during that conversation was Reading's lack of involvement in the appraisal and settlement negotiations since the process required the participation of all three parties – the applicants and the “white knight.” (Swanson Testimony, Tr. at 2270:18-2272:2). At that time, Gilbert made clear that he didn't want his time wasted and that Adams was only interested in pursuing serious negotiations. (Swanson Testimony, Tr. at 2273:9-20; Swanson Notes at 11.)

On July 16, 1999, Ms. Swanson again discussed settlement with Adams,<sup>14</sup> although she could not say for certain whether that discussion was with Gilbert or

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settlement of this proceeding,” none of the documents comprising Adams Hearing Ex. 75 were produced by Adams. The failure to produce these documents is consistent with Adams' efforts to conceal its involvement with Telemundo.

<sup>13</sup> Ms. Gaulke may also have participated in the conference. (Swanson Testimony, Tr. at 2269:11-2270:7.)

<sup>14</sup> Ms. Swanson also spoke to Gilbert on June 14, 1999, about the possibility of Telemundo providing Adams with programming in the event Adams' application were to be successful. Ms. Swanson indicated that that issue may have come up as part of concerns Gilbert had about settlement. (Swanson Testimony, 2279:12-2280:2.)

Mr. Cole. (Swanson Testimony, Tr. at 2284:10-2285:5; Swanson Daytimer for July 16, 1999 (the July 16, 1999 entry is in the record as Reading Hearing Ex. 54, p.4.))<sup>15</sup>

These facts clearly reveal that Adams had a serious interest in and considerable dealings with Telemundo with respect to the possibility of settlement. Yet despite his personal involvement with Ms. Swanson and Telemundo in the appraisal process and his first-hand participation in the settlement discussions, Gilbert has repeatedly denied, concealed, and minimized Adams' involvement with Telemundo with respect to the appraisal and settlement.

Adams' efforts to conceal its involvement with Telemundo began at Gilbert's October 14, 1999 deposition wherein he gave the following testimony with respect to settlement:

Mr. Hutton: Have you ever been involved in any discussions with anyone about potential sale of the FCC authorization if your application were granted?

Mr. Gilbert: I don't think so. What's his name offered us \$250,000 to back out.

Q: Who was that?

A: Micheal Parker.

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<sup>15</sup> On September 15, 1999, at approximately 12:30 p.m., Ms. Swanson faxed a letter to Ann Gaulke, a Telemundo executive, to update her on the Reading television renewal proceedings. (September 15, 1999, letter from Ms. Swanson to Ms. Gaulke (that letter and the accompanying fax confirmation report are in the record as Reading Hearing Ex. 67, pp. 1-2, 21.)) Ms. Swanson concluded that letter with a warning that "[t]he parties' costs and expenses, for which I am sure they will seek reimbursement in any settlement, will mount quickly during the current discovery and pre-trial phases" and by encouraging Ms. Gaulke "to move promptly to resolve any impediments that may remain to your putting forth a serious settlement offer." (*Id.*, p. 2.) At roughly 4:15 p.m., Ms. Swanson briefly called Mr. Gilbert's office (Telephone Report for September 15, 1999 (Reading Hearing Ex. 51, p. 1) and ten minutes later faxed Howard Gilbert's address to Ms. Gaulke. (September 15, 1999, Fax Transmittal Cover Sheet and confirmation report (the Transmittal Sheet and confirmation are in the record as Reading Hearing Ex. 68.))

Q: When did that occur?

A: Sometime in the last three years or something I would say. I'm bad on -- if I had to say closer to one year than to three years, but he called me and offered 100 -- 250,000 if we would withdraw our application.

Q: What was your response?

A: Told him we wanted to operate the station. Let's see. Telemundo may have made -- I don't remember, but Telemundo, I'm not sure -- but they -- I guess not. I'm not sure if anybody has ever made an offer. Somebody, I'm not sure who talked about making a joint offer to us and your client about selling our interests. I don't remember who that was.

Q: Do you think it might have been Telemundo or someone representing Telemundo?

A: I just don't remember. I'm not even sure it was Telemundo. But I just dismissed it pretty much out of hand. I just don't remember. It might have been Telemundo and somebody else. I just don't remember.

Q: Do you recall if a specific dollar amount was ever presented to you?

A: No, no figure was ever presented.

Q: Why did you dismiss it out of hand?

A: We intend to operate the station. We intend to win the lawsuit.

Q: Have you ever had any discussions with Telemundo or any other programmer about providing programming to the station if your application is successful?

A: No.

Q: The more recent approach to you about settling the case, do you recall when that occurred?

A: You mean Parker's?

Q: No, no, the other group that you couldn't remember?

**A: Nobody ever offered to settle the case. The only offer I ever had to settle the case was Mike Parker's for 250.**

**Q: Maybe I misunderstood. I had thought that the other party that approached you was interested in disposing of your application and acquiring the station; is that correct?**

**A: They said they wanted to talk to Parker and to us about it.**

**Q: Do you recall when that discussion occurred?**

**A: I would say sometime in the last year or 18 months.**

**Q: Was that a face-to-face meeting?**

**A: No. It could have been Parker and another guy for all I know. It was a phone call.**

**Q: Did anyone besides you participate in that call on behalf of Adams Communications?**

**A: It was a call to me. Only the party on the other side.**

**Q: You didn't patch in Mr. Haag?**

**A: No, no. I didn't give it a lot of credence frankly. It was a phone call.**

**Q: Where was it left at the end of that phone call?**

**A: Nothing ever came of it. I told him I wasn't interested, but I never got a second call.**

**Q: Do you recall any other discussions with any party outside of Adams Communications about a potential settlement of the case?**

**A: None.**

(Gilbert Depo., 21:7-24:17 (emphasis added).)

Adams' attempts to mislead Reading and the Commission about its involvement in settlement discussions continued in Adams' opposition to Reading's

motion to designate an abuse of process issue. Thus, in his November 22, 1999, Declaration in support of that Opposition, Gilbert claimed:

I am also aware that, on at least one occasion in 1995, the FCC did afford pending applicant's an opportunity to settle on a for-profit basis. Since Adams is not interested in any settlement, Adams has not attempted to take advantage of any such opportunity. In fact, Adams has never approached RBI – or anyone else – seeking to settle this case, not does Adams have any intention of doing so. While Adams has never sought any settlement, RBI has offered to pay Adams to dismiss the Adams application. In keeping with its unwillingness to enter into any settlement, Adams summarily rejected RBI's offer.

(Gilbert Decl., ¶ 9 (emphasis in original).)

Gilbert continued his efforts to conceal and minimize Adams' dealings with Telemundo in January when he testified during Phase I. There, for the first time, Gilbert acknowledged Adams' participation, with Telemundo, in an appraisal for WTVE. (This acknowledgement was, however, hardly voluntary, coming only after the existence of the appraisal had been disclosed to Reading in its civil litigation with Telemundo.) Gilbert claimed, however, that that appraisal had nothing to do with settlement but was simply a cheap way to satisfy his curiosity as to the value of the station. (Gilbert Testimony, Tr. at 1095:12-1096:1.) Thus, Gilbert stated:

Mr. Hutton: Was the appraisal being discussed for the purposes of a potential white knight settlement?

Mr. Gilbert: Not from our point of view.

Q: Was it presented by Telemundo's representative for that purpose?

A: There were never any settlement discussions, no.

\* \* \*



**Q:** So it's your testimony that [the appraisal] had nothing to do with a potential settlement?

**A:** Not from my point of view it didn't.

**The Court:** Wait a minute. That's not a response to the answer, I mean not from your point of view it didn't.

**What knowledge did you have of a possible settlement opportunity or settlement proposal coming from somebody other than Parker at this time? Any knowledge at all that you had?**

**Mr. Gilbert:** None.

**Q:** Absolutely none whatsoever? Is that your testimony?

**A:** That's my testimony.

(Gilbert Testimony, Tr. at 1099:2-7, 1101:22-1102:9 (emphasis added).)

Both Gilbert's deposition testimony and his January testimony with respect to Adams' involvement with Telemundo and the possibility of settlement were plainly false. Gilbert had *personally* discussed the possibility of a settlement with Ms. Swanson on April 30, 1999, wherein he agreed to share the cost of the appraisal so that he could determine Adams' settlement position. Then again, after having received the appraisal, Gilbert participated in a telephone conference with Ms. Swanson to further discuss settlement wherein he made clear that Adams was only interested in pursuing serious negotiations.<sup>16</sup> Thus, having been personally involved in the settlement discussions with Telemundo, Gilbert most certainly knew that his testimony was false when he gave it.

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<sup>16</sup> This interest in only "serious negotiations" plainly contradicts Gilbert's prior claim that he dismissed the matter "out of hand." (Gilbert Depo., 21:21-22:19.)

In its April 19, 2000 Answers to Interrogatories, Adams again tried to minimize its dealings with Telemundo. Thus, while finally acknowledging that Ms. Swanson has contacted Adams on behalf of “a client who might be interested in participating in a buy-out, or ‘white-knight’, settlement of the Reading proceeding” and admitting that “a copy of the appraisal was provided to Mr. Cole by Ms. Swanson by letter dated June 3, 1999.” (Adams’ Answers to Interrogatory filed April 19, 2000 at 22<sup>17</sup>.) Gilbert continued to maintain that he:

did not view the cost-sharing arrangement for the appraisal as relating to any ‘potential settlement’ as far as Adams was concerned; rather, he was curious about the potential value of the television station in Reading, and the cost to Adams of the appraisal, i.e., approximately \$3,000, or one-third the total cost of the appraisal, was sufficiently low as to justify satisfying that curiosity.

(Id.) Gilbert then asserted that, “[t]o the best of [his] recollection there were no communications between Ms. Swanson and Adams concerning any potential settlement following Adams’s receipt of the appraisal.” (Id.)<sup>18</sup>

The statement that Gilbert did not view the cost-sharing arrangement for the appraisal as relating to any ‘potential settlement’ but that it was undertaken just to satisfy his curiosity is clearly false. As the evidence plainly shows, getting a value for the station so that Adams could determine a “number” for purposes of settlement was the whole point of the appraisal. (Swanson Testimony, Tr. at

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<sup>17</sup> Gilbert affirmed, under penalty of perjury, that the Answers to Interrogatories were true and correct to the best of his knowledge. (Adams’ Answers to Interrogatories at 23.)

<sup>18</sup> Of course, Gilbert had previously and adamantly claimed that there had never been any possible settlement opportunity or settlement proposal coming from somebody other than Parker and an unidentified man. (Gilbert Testimony, Tr. at 1101:22-1106:25.)

2223:12-2226:9; Swanson Notes at 5.) Nor is it true that “there were no communications between Ms. Swanson and Adams concerning any potential settlement following Adams’s receipt of the appraisal.” Clearly Adams discussed settlement with Ms. Swanson on June 7, 1999, after having received the appraisal and then again in July, 1999.<sup>19</sup>

The fact that Adams did discuss settlement with Ms. Swanson after having received the appraisal further belies Adams’ claim that it undertook the appraisal process solely to satisfy Gilbert’s curiosity “about the potential value of the television station in Reading.” Thus, if the “curiosity” claim were, in fact, true, then one would indeed expect that, having received the appraisal and satisfied his curiosity, there would be no further “communications between Ms. Swanson and Adams concerning any potential settlement following Adams’s receipt of the appraisal.” If, on the other hand, Adams did view the appraisal as a preliminary step toward a buy-out settlement with Telemundo, as it most certainly did, then one would reasonably expect that, upon completion of that preliminary step, Adams and Telemundo would have further explored the settlement issue – which is exactly what they did. (Swanson Testimony, Tr. at 2268:6-2274:7; Swanson Notes at 10-11.) Thus, the fact that Adams considered the appraisal to be part of a potential settlement is fully consistent with the totality of the evidence, whereas Gilbert’s “curiosity” claim is flatly contrary to the evidence as a whole.

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<sup>19</sup> It also appears that Adams may have discussed settlement directly with Telemundo sometime after September 15, 1999. See supra note 15.